Nos. 91-543; 91-558; 91-563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

against

THE UNITED STATES OF AMERICA; et. al.

Respondents,

AMERICAN COLLEGE OF NUCLEAR PHYSICIANS; AMERICAN MEDICAL ASSOCIATION; APPALACHIAN COMPACT USERS OF RADIOACTIVE ISOTOPES; CALIFORNIA RADIOACTIVE MATERIALS MANAGEMENT FORUM, INC.; EDISON ELECTRIC INSTITUTE; MALLINKRODT MEDICAL, INC.; SOCIETY OF NUCLEAR MEDICINE; et al.

Amici Curiae.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*

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INTEREST OF AMICI CURIAE

This brief[1] presents the Court with the perspective of a wide variety of generators of low-level radioactive waste ("LLRW").[2]

The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j (1988) ("1985 Act") (amending Low-Level Waste Policy Act of 1980, 42 U.S.C. §§ 2021b-2021d (1982) ("1980 Act")) established an innovative program to address a matter of national concern — assuring adequate LLRW disposal capacity. Such capacity is essential to the continued availability of the many beneficial services and products provided through the use of radioactive materials. This brief describes the serious adverse impacts that will arise if the Court invalidates either the 1985 Act as a whole or the "take title"[3] provision in particular and the national importance of preserving the 1985 Act in its entirety. *Amici* also explain their view that the 1985 Act does not improperly intrude upon the constitutionally protected sovereignty of the individual states and why its continued vitality is a matter of overriding federal interest which should outweigh any arguable imposition on state sovereignty.

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[1] In accordance with Rule 37.3 of this Court, the written consent to the filing of this brief has been received from each of the parties and has been filed with the Court.

[2] In addition to the parties named on the cover of this brief, the following companies are participating as *amici*: Arizona Public Service Company; Baltimore Gas & Electric Company; Commonwealth Edison Company; Detroit Edison Company; Duke Power Company; Duquesne Light Company; Entergy Operations, Inc.; Florida Power & Light Company; Gulf States Utilities Company; Houston Lighting & Power Company; Northern States Power Company; Pacific Gas & Electric Company; Pennsylvania Power & Light Company; Southern California Edison Company; Union Electric Company; Virginia Electric and Power Company; Wisconsin Electric Power Company; and Wisconsin Public Service Corporation.

[3] The "take title" provision states that:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the

(footnote continues)

Amici are a diverse group of private companies, public institutions, and organizations representing providers of a wide range of critical services to the citizens of the United States through the use of radioactive materials. The American Medical Association is a private, voluntary, non-profit organization of physicians. Its 280,000 members — over half of all physicians currently licensed to practice medicine — practice in all fields of medical specialization. The American College of Nuclear Physicians and the Society of Nuclear Medicine represent about 14,000 nuclear medicine physicians, scientists, technologists and radiopharmacists who utilize such radioactive materials in diagnostic, therapeutic and biomedical research applications including, among other things, detection and treatment of cancer. The Edison Electric Institute is the association of the nation's investor-owned electric utilities. Its members generate 78 percent of all electricity in the nation. The various electric utilities participating as *Amici* generate electricity for millions of residential, municipal, industrial, and commercial customers through the operation of nuclear power plants. The California Radioactive Materials Management Forum, Inc. and the Appalachian Compact Users of Radioactive Isotopes represent a wide range of industrial, medical, institutional and other users of radioactive materials. Their members include hospitals, universities, biomedical research firms, pharmaceutical manufacturers, utilities and other industrial concerns. They produce such diverse products and services as spacecraft, sheet

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(footnote continued)

> disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C) (1988).

metal, biotechnology compounds, art authentication, cosmetics, plastics, polymers, agricultural research, radiolabeled research chemicals and computers. Finally, Mallinkrodt Medical, Inc. is a major manufacturer and distributor of radiopharmaceuticals and operates nuclear pharmacies across the United States. *Amici* generate LLRW as a byproduct of the many beneficial services they provide.

Petitioners request that the Court upset the delicate compromise of state and national interests which the 1985 Act effected, by declaring the take title provision or the entire 1985 Act unconstitutional. If the Court does find the 1985 Act unconstitutional, the substantial progress which has been achieved toward resolving the problem of LLRW disposal will be imperilled if not destroyed. In turn, the continued availability of many of the products and services provided by *Amici* will be seriously jeopardized.

The 1985 Act is working. After years in which efforts to solve the LLRW problem were essentially frustrated, the states, pursuant to the 1985 Act, are slowly but surely developing new LLRW disposal facilities. We do not suggest that the 1985 Act is perfect or that progress is being made as expeditiously or efficiently as possible. There can be significant political obstacles to the siting and operation of any new industrial facility, particularly when radioactive materials are involved. But one thing is clear — progress towards the goal established by Congress and encouraged and endorsed by the states is being achieved. That progress will be disrupted if the basic structure of the 1985 Act is invalidated as Petitioners request.

Both the 1985 Act and its predecessor, the 1980 Act, had their origins in the threatened closure of the only three privately developed and managed commercial LLRW disposal facilities in the United States. In the late 1970s, the governors of the states in which those three privately operated facilities are located (South Carolina, Washington and Nevada)

threatened to shut them down if the burdens of LLRW disposal were not more equitably shared among the states.[4] Realistically viewed, what was involved was not a problem of technology, capacity, or abrogation of responsibility by private waste generators. It was a conflict among the states — political in nature — concerning the shipment of LLRW from all of the states where it is generated to the only three states with disposal facilities. In that context, both Acts represented a resolution of that conflict originated by the states and concurred in by the federal government.

The 1980 Act assured continued availability to all LLRW generators of the three existing disposal facilities until January 1, 1986. 42 U.S.C. § 2021d(a)(2)(B) (1982). It established a federal policy encouraging states to develop additional LLRW disposal facilities and to enter into interstate compacts providing for the joint use of those disposal facilities. *Id.* § 2021d(a)(2). However, it contained only one real incentive for state action. That was the authority granted to states beginning on January 1, 1986, to restrict access to LLRW disposal facilities to generators in states that were members of interstate compacts to which Congress had consented. *Id.* § 2021d(a)(2)(B). Without that authority, states with LLRW disposal facilities could not, under the Commerce Clause of the U.S. Constitution, restrict access to their new LLRW disposal facilities.[5]

The 1980 Act represented a novel approach to a national problem. Through the use of interstate compacts, it afforded the states wide latitude in deciding how best to provide for

[4] *See* Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 441-43 (1987).

[5] Absent congressional authorization, a state may not discriminate on the basis of the state of origin in deciding whether to accept for disposal radioactive or other wastes. *E.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

the safe and orderly disposal of LLRW. By 1985, some progress had been made. In particular, as of that year, some thirty-seven states had enacted compact legislation.[6]

However, as the January 1, 1986 date approached, it became apparent that no new LLRW disposal facilities would be available by that time.[7] On the other hand, the member-states of the interstate compacts which utilized the three operating LLRW disposal facilities in South Carolina, Washington and Nevada were ready to take advantage of the congressionally granted authority to close their borders to LLRW produced in states outside their respective compact regions.[8] Congressional consent to those compacts would have created a national crisis by eliminating access to LLRW disposal capacity to generators in the thirty states[9] that were not members of, or eligible to join, those three compacts.

Responding to legislation introduced in Congress in 1984 to modify the 1980 Act, the National Governors' Association ("NGA") sponsored over a dozen meetings attended by "sited" and "unsited" state representatives and regional compact commission officials in an effort to achieve a state consensus on how to amend the 1980 Act.[10] After considerable deliberation and extensive compromise, a consensus was reached which again formed the basis for congressional action. The 1985 Act was adopted to prevent the impending crisis and to establish a mechanism for avoiding a similar crisis in the future.

In retrospect, the 1980 Act provided little more than a statement of policy encouraging states to join LLRW disposal compacts, and upon receipt of congressional consent, the

[6] Berkovitz, supra note 4, at 447.

[7] *Id.* at 445.

[8] *See id.* at 446.

[9] *See id.* at 447 n.50.

[10] Holmes Brown, *The Low-Level Waste Handbook: A User's Guide to the Low-Level Radioactive Waste Policy Amendments Act of 1985* iv (1986).

authority to exclude LLRW from outside their compact regions. The 1980 Act contained no other provisions effectively encouraging the development of new LLRW disposal facilities. The 1985 Act, on the other hand, established a detailed series of milestones, penalties and incentives intended to progressively encourage the development of new LLRW disposal facilities. 42 U.S.C. §§ 2021e(d)-(g) (1988). It also extended access to the three existing LLRW disposal facilities until January 1, 1993, contingent upon state compliance with the various milestones. *Id.* §§ 2021e(a),(e),(f). In order to encourage compliance with the milestones, the 1985 Act established several incentives.

First, as a condition of continued access to the three existing LLRW disposal facilities, the 1985 Act required LLRW generators to pay escalating surcharges to the three states in which the operating LLRW disposal facilities were located. *Id.* § 2021e(d)(1). If the state or compact region in which the generator was located met a milestone, a portion of those surcharges paid by the generators would be paid to that state or to the compact commission to facilitate their disposal facility development efforts. *Id.* § 2021e(d)(2). Failure to meet such milestones would result in generators in the non-complying state or compact being subjected to increasing "penalty" surcharges and/or actual denial of access to the existing LLRW disposal facilities prior to January 1, 1993. *Id.* § 2021e(e)(2).

Since 1985, commercial LLRW generators have been penalized for the failure of their states or regions to meet the milestones, while complying states and regions have been

rewarded. To date, LLRW generators have paid approximately $125 million in LLRW disposal surcharges[11] and generators in the States of Michigan, New Hampshire, Vermont and Rhode Island and in the District of Columbia and Puerto Rico have been denied access to the existing LLRW disposal facilities.[12] No direct consequence has been imposed on the states themselves.

Beginning on January 1, 1993, states with operating disposal facilities may deny access to those facilities to any generators outside their respective compact regions. 42 U.S.C. § 2021e(d)(2)(C) (1988). Thus, failure of their states to provide access to an operating facility by that time could result in LLRW generators being denied access to disposal capacity.

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[11] The figure is calculated from the base surcharges set forth in section 2021e(d)(1) of the 1985 Act and volumes of LLRW shipped for disposal from all states outside of the three sited compact regions between 1986 and 1991. See National Low-Level Waste Program, U.S. Department of Energy, State-by-State Assessment of Low-Level Radioactive Wastes Received at Commercial Disposal Sites (Sept. 1990) for volumes generated between 1986 and 1990. See *LLRW Disposal Update*, The Radioactive Exchange, Nov. 27, 1991 at 14-15 for 1991 volumes.

[12] *See* 1990 U.S. Department of Energy Annual Report on Low-Level Radioactive Waste Management Progress at ix ("1990 DOE Annual Report"). Under separate contracts between New Hampshire, Rhode Island and the District of Columbia and the Rocky Mountain Low-Level Radioactive Waste Compact, LLRW from these states is temporarily being shipped for disposal to the disposal facility in Nevada. 1989 U.S. Department of Energy Annual Report on Low-Level Radioactive Waste Management Progress at vii.

However, even in 1993, if a state has failed to assure availability of disposal capacity, it is not required to take title and possession of LLRW generated within its borders.[13]

Thus, under the 1985 Act, it is not until January 1, 1996 (fifteen years after passage of the 1980 Act and eleven years after passage of the 1985 Act) that *any* direct consequence is applied to states that have failed to provide for LLRW disposal capacity. 42 U.S.C. § 2021e(e)(2)(C) (1988). That consequence, at issue in this case, is the provision requiring such states to accept title and possession, or upon failure to take possession, assume liability for LLRW generated within their borders. *Id.*

This graduated incentive and penalty process has produced significant progress. Forty-two states are members of nine compacts.[14] Several states plan to develop their own intrastate disposal facilities and compact host states have been selected.[15] Detailed license applications have been submitted for new disposal facilities in several states.[16] This level of progress should not be underestimated. Siting of any

[13] Under the 1985 Act, a state that does not provide access to an operational disposal facility by January 1, 1993 has the option either to take title to all LLRW generated within its borders or rebate to the generators twenty-five percent of the surcharges collected from such generators between January 1, 1990 and December 31, 1992 to which the state would be otherwise entitled. *See* 42 U.S.C. § 2021e(d)(2)(C) (1988). Since states may charge generators for the costs of developing the new disposal sites, rebating twenty-five percent of the surcharges to the generators will not hinder a state's development of a disposal facility. States will, nevertheless, be able to recoup the costs of facility development from the LLRW generators. Indeed, New York requires LLRW generators to finance "all costs and expenses" of siting, developing, licensing, constructing, operating and maintaining a disposal facility. *See* N.Y. Pub. Auth. Law §§ 1854-d.2.1.a.-b. (McKinney Supp. 1992).

[14] *See LLRW Disposal Update*, *supra* note 11, at 14-15.

[15] *See* 1990 DOE Annual Report, *supra* note 12, at viii.

[16] *Id.*

nuclear facility is a difficult task, particularly with the prevalence of the "not in my backyard", or "NIMBY", attitude of many individuals.

If the 1985 Act is invalidated, the progress to date will be imperilled if not destroyed. That progress has occurred as a result of the detailed, negotiated compromises reached in the individual regional compacts and the potential impact of the take title provision. An essential component of those compromises is the authority of each of the compact regions to exclude out-of-region LLRW once their facilities are developed. However, if the 1985 Act is overturned, the congressionally granted authority of compact regions to deny access to out-of-region LLRW likely will be eliminated.[17]

Without that exclusionary authority, the incentive for states to continue to develop new disposal facilities will be significantly reduced.[18] Under such circumstances the three states which now host operating disposal facilities will be

[17] The 1985 Act specifies that the authority of a compact to exclude out-of-region LLRW "shall not take effect" until Congress consents to the compact. 42 U.S.C. § 2021d(c) (1988). In the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, § 201, 99 Stat. 1859 (1986), Congress consented to seven compacts. However, such consent was explicitly granted "subject to the provisions of the [1985 Act]." *Id.* § 212, 99 Stat. at 1860. Subsequently, Congress consented to two more compacts with similar conditions. *See* Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub. L. No. 100-319, § 1, 102 Stat. 471 (1988); Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. No. 100-712, § 1, 102 Stat. 4773 (1988).

[18] For example, the California Department of Health Services recently informed the developer of the planned Southwestern Low-Level Radioactive Waste Disposal Compact disposal facility in California that "[s]ufficient information is now available . . . to make a licensing decision and complete the environmental review, including all necessary findings and support documentation." Letter from Don J. Womeldorf, Chief Environmental Management Branch, California Department of Health Services, to Stephen A. Romano, Vice President,

(footnote continues)

faced with the hard choice of either closing those facilities or making them available to all LLRW generators — the very choice they confronted in 1980 and 1985.

Loss of access to LLRW disposal facilities will jeopardize the continued availability of many of the beneficial products and services provided by *Amici* and thus raises the problem to one of vital federal interest. As described on p. 28 infra, through the provisions of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, *et seq.*, as amended (1988), Congress has clearly articulated the strong federal interest in assuring the full development and peaceful uses of radioactive materials. The uses include the products and services provided by *Amici*.

The uses of radioactive materials in our society are widespread. A small sample of their diverse applications includes medicine, biomedical research, energy production, mineral exploration, airport security, nondestructive examination of pipes and welds, pest eradication, breeding of new seed varieties, and archeological dating.[19]

In the field of biomedical research, radioactive materials are used in a wide range of applications including cell biology, molecular biology, neurobiology, genetics research, cancer research and Acquired Immune Deficiency Syndrome

(footnote continued)

U.S. Ecology, Inc. (Dec. 26, 1991). However, the Director of the California Department of Health Services also recently indicated that California will probably wait for a decision from the Court in this case before undertaking any additional major efforts toward opening that facility. Nuclear Regulatory Commission, *Weekly Information Report — Week Ending January 24, 1992*, Enclosure Q at 7 (Jan. 30, 1992).

[19] Anne Bisconti & Robert Livingston, *Let's Talk About Radiation*, Nuclear Industry, Fourth Quarter 1991, at 38, 39.

("AIDS") research.[20] In New York, 30-40 percent of the total annual volume of LLRW generated is produced by biomedical research activities.[21] The carbon-14 and hydrogen-3 isotopes are used extensively in biomedical research. Their half-lives are approximately 5,700 years and 12.5 years respectively.[22] Isotopes with such long half-lives cannot be conveniently stored for radioactive decay at most biomedical research facilities. They are frequently contained in high volume wastes, such as animal carcasses, that are difficult to store for long periods of time and that would quickly fill up available freezer capacity.[23] To expand storage capacity, even if possible, will divert resources from critical research activities.

In the nuclear medicine field, about 12 million diagnostic procedures, 50,000 therapeutic procedures and 100 million laboratory tests are performed in the United States annually using radioactive materials which must be disposed of in accordance with federal regulations.[24] Denial of access to disposal capacity will impede the availability of these procedures.[25] Indeed, in Michigan (which has been denied access to the three operating disposal facilities) nuclear

[20] Gordon I. Kaye, Ph.D., *The Crisis in LLRW Disposal: Short- and Long-Term Effects on the Biomedical Community*, XIX The Health Physics Soc'y Newsl. 1 (Sept. 1991); *see also Low-Level Radioactive Waste Regulation — Science, Politics and Fear* 112 (Michael E. Burns ed., 1988).

[21] Kaye, *supra* note 20, at 1.

[22] *Id.* at 4.

[23] *Id.*

[24] Carol S. Marcus, Ph.D, M.D., *Why We Need a Low-Level Radioactive Waste Site*, 43 ACURI — A Newsletter for Appalachian Compact Users of Radioactive Isotopes 1 (Jan. 1992); *see also* Burns, *supra* note 20, at 109-12.

[25] *Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083 and H.R. 1267 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 341-43 (Mar. 7-8, 1985) (statement of Robert E. Henkin, M.D. and William H. Briner).

medicine procedures at at least one hospital have been curtailed due to the absence of necessary LLRW storage space.[26] In addition, the production of radioactive materials used in nuclear medicine generates large amounts of LLRW that require disposal.[27] Unavailability of disposal capacity thus will likely result in cutbacks in or even cessation of nuclear medicine activities and patient care and use of higher risk and more expensive technology.[28]

The commercial nuclear power industry is also affected by the availability of LLRW disposal capacity. Commercial nuclear power plants were not intended to serve as long-term LLRW storage repositories and may not be licensable for long-term storage. While it is possible to establish additional interim onsite storage capacity and some utilities are doing this, Nuclear Regulatory Commission ("NRC") policies discourage onsite storage. The NRC has made clear that "use of on-site storage should be considered an option of last resort" and strongly favors permanent disposal.[29]

Even if only the take title provision of the 1985 Act is overturned and the balance of the 1985 Act is preserved, similar adverse results are likely to occur. In that event, presumably the provisions of the 1985 Act authorizing states to exclude out-of-region LLRW would remain intact, and the three existing "host" states would be permitted to exercise that authority and exclude LLRW generators from outside

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[26] Anita Warren, *Radiation Phobia: It Could Be Hazardous to Your Health*, Nuclear Industry, Third Quarter 1991, at 18, 29.

[27] Burns, *supra* note 20, at 111.

[28] *Management Compacts on Low-Level Radioactive Waste: Hearing on S. 44, S. 356, and S. 442 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 226-27 (Mar. 8, 1985) (statement of Robert E. Henkin, M.D.).

[29] Memorandum from Samuel J. Chilk, NRC Secretary, to James M. Taylor, NRC Executive Director for Operations, on SECY-91-306 — Analysis of Comments Received on Title-Transfer and Possession Provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 at 1 (Jan. 30, 1992).

their respective regions. At the same time, loss of the most meaningful incentive for state progress in developing new disposal facilities — the take title provision — will seriously impede disposal facility development efforts elsewhere.

Furthermore, as described above, virtually all of the 1985 Act incentives and penalties (surcharges and denials of disposal facility access) are imposed on the LLRW generators not upon the states, yet the generators do not control the disposal facility development process. If the hard work of actually licensing and building new disposal facilities is to come to a successful conclusion, it is essential that states have meaningful incentives to further progress — as Congress intended.

SUMMARY OF ARGUMENT

The 1985 Act should be upheld and the decision below affirmed, whether based upon the principles enunciated in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985), or upon the view that the Tenth Amendment provides the states with more expansive substantive protection against congressional action under the Commerce Clause.

There was no defect in the national political process that resulted in passage of the 1985 Act. To the contrary, the 1985 Act represents an unusual example of federal-state cooperation. Furthermore, the 1985 Act clearly does not jeopardize the constitutional equality of the states.

The 1985 Act does not undermine or unduly impair the essentials of state sovereignty. Instead, it effectuates the states' desire that they be responsible for assuring sufficient disposal capacity for LLRW generated within their borders. In addition, the 1985 Act leaves to the states significant choices concerning how to carry out the task which they volunteered to undertake.

The 1985 Act has minimal adverse impacts on the states and in no way infringes on state sovereignty. Virtually all of those impacts, such as surcharges and denial of access to disposal facilities, are imposed upon the waste generators, not upon the states. Only after 1995, ten years after the passage of the 1985 Act, are such impacts (in the form of the take title provision) imposed upon the states. However, this will occur only for those states that fail to provide disposal facilities in fulfillment of the responsibility sought by the states themselves. Moreover, even if a state is required to take title to LLRW, its essential authority to govern remains intact.

While Petitioners implicitly agree that federal action which might otherwise violate the Tenth Amendment will not be invalidated if agreed to by the affected states, they argue that endorsements by state congressional delegations and organizations representing the states do not evidence such acquiescence. However, we are aware of no authority which holds that such acquiescence can only be manifested by some formal state action, *e.g.*, by its legislature or governor, or both. Rather, it should be ascertained in a realistic and practical manner, by considering the actions of the states' representatives in Congress, the positions of organizations representing the states or their officials, and state activity designed to implement the allegedly offending federal legislation. All of those factors show that New York acquiesced in the 1985 Act.

Finally, the 1985 Act was adopted to avert a nationwide disposal crisis that threatened critical services relating to health and commerce. It is achieving the results intended and is doing so in a manner that is not destructive of state sovereignty. In such circumstances, the minimal, if any, "state submission" to federal authority is constitutionally justified.

ARGUMENT

The grant of the petition in this case suggests that the Court may revisit the standard set forth in *Garcia* upon which the decisions below were based. However, under any test of state sovereignty under the Tenth Amendment, the 1985 Act should be recognized as a unique example of voluntary cooperation between the states and the federal government on a matter of considerable national interest, *i.e.*, the development of the peaceful uses of nuclear energy. *See* Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, *et seq.*, as amended (1988); *see also English v. General Elec. Co.*, 110 S. Ct. 2270, 2276-77 (1990); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

Therefore, Petitioners' claims that state sovereignty has been thwarted must be evaluated not only in light of the Tenth Amendment, but also in light of the reasonable means chosen by both the states and Congress to forge an acceptable solution to a matter of fundamental federal interest. Under that compromise, the states through compacts have obtained permission to exclude LLRW from outside their borders. In return they have assumed the responsibility to establish regional disposal facilities for waste generated within their borders, and under certain circumstances, to take title to that waste if such facilities are not operating by 1996.

It is in the context of this rare example of cooperative federalism that Petitioners challenge the application of the *Garcia* test by the courts below. Accordingly, we first argue that if the *Garcia* test is applied here, the decisions below should be upheld. Second, we argue that even if this Court decides to modify *Garcia* significantly, the 1985 Act, including the take title provision, should be upheld.

I.

WHEN REVIEWED AGAINST *GARCIA*, THE 1985 ACT INCLUDING THE TAKE TITLE PROVISION FULLY COMPORTS WITH THE TENTH AMENDMENT

The *Garcia* Court held that states must look to the federal political process to protect them against undue congressional encroachment. The *Garcia* Court recognized that:

> the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these [*Garcia*] cases the internal safeguards of the political process have performed as intended.

Garcia, 469 U.S. at 556. Three years later, this Court in *South Carolina v. Baker*, 485 U.S. 505, *reh'g denied*, 486 U.S. 1062 (1988), reaffirmed *Garcia*, holding that there was no infringement on state sovereignty where there had been no "extraordinary defect" in the political process that led to the enactment of the law. *Id.* at 512.

Although primarily limiting judicial review to an examination of the political process, the Court in *Garcia* indicated that additional limits might exist on congressional action, referring to *Coyle v. Oklahoma*, 221 U.S. 559 (1911). In *Coyle*, the Court stated:

> the *constitutional equality of the States is essential* to the harmonious operation of the scheme upon which

> the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Coyle, 221 U.S. at 580 (emphasis added).

Thus, *Garcia*, *Baker* and *Coyle* allow judicial interdiction of federal powers only when (1) that power is a result of an extraordinary defect in the political process and (2) when the constitutional equality among the states has been jeopardized. If this test is applied, as we submit it should be, the decisions below should be affirmed. Neither the 1985 Act as a whole, nor the take title provision separately, exceed these limits on congressional action.

That there was no defect in the national political process surrounding the enactment of the 1985 Act is clear. The passage of the 1985 Act represents a model of cooperation and compromise among states with varied interests and the federal government that rarely has been achieved. The states had ample opportunity, and New York in particular utilized that opportunity, to participate in the legislative process. Neither New York nor any other state was left "politically isolated and powerless" by the passage of the 1985 Act. *Baker*, 485 U.S. at 513. Nor was any state "deprived of any right to participate in the national political process." *Id.* at 512-13. Indeed, although not needed to avoid a defect in the political process, New York's representatives in Congress fully supported the passage of the 1985 Act, including the take title provision.

The 1985 Act, like the 1980 Act, evolved from the specific proposals of the states themselves as articulated by, among others, the NGA. As one commenter noted, the states "volunteered their services . . . to join in a cooperative federal-state campaign to find adequate waste disposal sites. This extensive state involvement produced substantial benefits for

all the states, strongly suggesting that state sovereignty received adequate protection."[30]

The states were also afforded a full opportunity to participate in the legislative process and New York fully participated in and supported the passage of the 1985 Act. Before the House Subcommittee on Energy and the Environment, Mr. Charles R. Guinn, Deputy Commissioner for Policy & Planning, New York State Energy Office, testified that New York was participating with the NGA to build a state consensus and supported the principle that the 1985 Act include "[a]ppropriate penalties . . . for failure to meet the [designated] milestones."[31] In addition, Senator Moynihan of New York, who served on the Senate Environment and Public Works Committee which devised the take title provision, stated on the eve of the 1985 Act's passage, that the 1985 Act, including the take title provision, "is indeed an equitable approach for all concerned, and I am pleased to support it."[32]

Here, the history of the passage of the 1985 Act indicates that the "internal safeguards of the political process have performed as intended." *Garcia*, 469 U.S. at 556. Indeed, the record shows a degree of state involvement and support for the 1985 Act which goes far beyond the minimum necessary to demonstrate that the political process had properly functioned.

Neither does the 1985 Act jeopardize the constitutional equality among the states in contravention of *Coyle*. As demonstrated above, review of the legislative history shows that the 1985 Act represents the culmination of the states' efforts to devise a workable structure for assuring an equitable distribution of benefits and burdens among the states. Under the 1985 Act, each state assumes responsibility for assuring the availability of LLRW disposal capacity within

[30] Berkovitz, *supra* note 4, at 473-74.

[31] Hearings, *supra* note 25, at 197-98 (statement of Charles R. Guinn).

[32] 131 Cong. Rec. S18,121 (daily ed. Dec. 19, 1985).

the state. Each state is equally free to devise how it will carry out its responsibility. Every state failing to make sufficient progress toward the development of new disposal facilities incurs consequences for its generators, and perhaps, ultimately for itself through the take title provision.[33]

Therefore, since the 1985 Act does not jeopardize constitutional equality among the states, and since it is not the product of a defect in the political process, it falls within the limits on congressional action set forth in *Garcia* and *Baker*. Accordingly, there has been no violation of the Tenth Amendment.

II.

EVEN IF THIS COURT FOLLOWS A SUBSTANTIVE TEST, THE 1985 ACT INCLUDING THE TAKE TITLE PROVISION IS CONSTITUTIONAL

Petitioners have suggested that whether or not *Garcia* is modified, this Court should undertake "substantive Tenth Amendment review" of the 1985 Act and, pursuant to such review, declare the 1985 Act unconstitutional. NYS Br. at 9; *see also* Cortland Br. at 7-8; Allegany Br. at 8-9. If the Court applies such a test, it nevertheless should hold that the 1985 Act is constitutional.

We assume that any such test will be based upon the fundamental principle that states have certain sovereign powers in our federal system that must be protected by the judiciary through affirmative limits on federal regulation.[34]

[33] In any event, even where, unlike here, Congress enacts legislation which results in the imposition of unique burdens on a particular state, that consequence alone does not make the legislation constitutionally infirm.

[34] Petitioners suggest that this Court return to a test which embodies this principle. NYS Br. at 9-10; Cortland Br. at 7-8; Allegany Br. at 8-9, 15-16.

Indeed, this concept of state sovereignty became the foundation for the test that was developed in the post-*National League of Cities v. Usery*, 426 U.S. 833 (1977) jurisprudence, and was supported by all the dissenting Justices in *Garcia*.[35]

In *National League of Cities*, this Court described the principle of state sovereignty in the following manner:

> [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

National League of Cities, 426 U.S. at 845. The majority's primary concern was that the imposition of certain federal regulations on state governments might, if left unchecked,

> allow "the National Government [to] devour the essentials of state sovereignty . . . ." It [the Court] therefore drew from the Tenth Amendment an "affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution."

Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 236 (1983) (quoting *National League of Cities*, 426 U.S. at 855, 841).

Petitioners argue that the 1985 Act is unconstitutional because it "totally undermines the existence of states as independent sovereign entities." NYS Br. at 9; *see also* Cortland Br. at 19; Allegany Br. at 9. On the contrary, the 1985 Act not only allows the states to function as separate and independent entities, but it in no way infringes upon the states' essential authority to govern. The Act preserves the basic principle of federalism that was articulated in *National League of Cities*

[35] *Garcia*, 469 U.S. at 573-74 (Powell, J., dissenting); *Id.* at 579 (Rehnquist, J., dissenting); *Id.* at 582 (O'Connor, J., dissenting).

and its progeny. *Amici* believe that the following principles would be relevant to any substantive evaluation of the 1985 Act.

1. The 1985 Act leaves the states with the authority to make fundamental decisions.

Petitioners state that:

> at least two features . . . have repeatedly been the focus of review of federal action under the Commerce Clause by the Court: (1) the ability of state governments to make independent policy choices about whether to engage in state government activities, and (2) the power of state governments to enact or decline to enact legislation.

NYS Br. at 15; *see also* Cortland Br. at 14-17; Allegany Br. at 11. Petitioners argue that the 1985 Act "commandeered the States' sovereign authority . . . and deprived the States of any independent opportunity to decide whether to participate in such a federally mandated program." NYS Br. at 9; *see also* Cortland Br. at 17-19; Allegany Br. at 15. Based on this argument, Petitioners conclude that the 1985 Act "differs materially from all federal actions previously reviewed by the Court under the Tenth Amendment." NYS Br. at 9; *see also* Cortland Br. at 19.

We disagree for several reasons. First, the states, including New York, played an integral role in the decisionmaking process that shaped the 1980 and 1985 Acts. Indeed, the fundamental element of the legislation was adopted from the NGA's specific recommendations.[36]

That element, the assignment of responsibility to the states for the disposal of LLRW generated within their borders, represented Congress' effectuation of the *states'* own

[36] The NGA's most recent policies continue to reflect support for the legislation. In particular, in its 1991-92 "Policy Positions Paper", the NGA states:

(footnote continues)

desire not to be subject to a federally imposed solution to the LLRW disposal problem. In essence, by enacting the 1985 Act, Congress acceded to the states' wishes.

Second, the 1985 Act leaves virtually all of the decisions on how the states should carry out that responsibility to the individual states. There is no federally mandated program and no obligation to enact any particular state legislative program. States may or may not enter into regional compacts to provide for the establishment of regional LLRW disposal facilities, may contract with compact commissions for access to regional disposal facilities, may build their own facilities using a state agency or by contracting with a private sector developer, or may invite or otherwise encourage the private sector to provide disposal capacity within the state. Congress has dictated neither the number, the location, the size, the design, nor the accessibility of such disposal facilities.

Nothing in the 1985 Act compelled New York to comply with the 1985 Act's provisions in the manner it chose. Rather than join a compact (as forty-three other states have done), New York chose to build its own intrastate facility. *See* N.Y. Pub. Auth. Law § 1854-c.3. (McKinney Supp. 1992). Rather than leave disposal facility site selection to private developers as others have done, New York adopted legislation establishing site selection standards and a public authorities control board to select a disposal site. *See* N.Y. Pub. Auth. Law §§ 50, 1854-c. (McKinney & McKinney Supp. 1992). Rather than

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(footnote continued)

> National inaction regarding the creation of additional storage capacity threatens to halt or seriously curtail medical research and diagnostic activities critical to the public health and welfare. Every community in this nation will be affected if it becomes more difficult to reap the benefits of nuclear medicine.
>
> Therefore, . . . [e]ach state should accept primary responsibility for the safe disposal of low-level waste generated within its borders . . . .

National Governors' Association, 1991-92 Nuclear Energy Policy, Committee on Energy and Environment, §§ 13.3.1-13.3.2.

retain a private contractor to construct the facility, New York provided for construction by a state agency. *See* N.Y. Pub. Auth. Law, § 1854-c.3. (McKinney Supp. 1992). Rather than have the NRC regulate the operation of the facility, New York chose to regulate it itself. *See* N.Y. Envtl. Conserv. Law §§ 29-0301 to -0305, 29-0501 to -0503 (McKinney Supp. 1992). Under New York law, *all* costs of these activities are passed onto the LLRW generators in the State. N.Y. Pub. Auth. Law §§ 1854-d.2.a.b. (McKinney Supp. 1992).

In short, Petitioners greatly exaggerate the extent to which the 1985 Act intrudes upon their ability to make choices and exercise their sovereign powers. Contrary to New York's assertions, Congress hardly acted by "congressional fiat and without regard for current or past state desire or practice." NYS Br. at 21-22. The 1985 Act leaves states with wide discretion in deciding how to carry out their responsibilities under the 1985 Act. Very little of what New York has chosen to do was compelled by the requirements of the 1985 Act. Clearly, the 1985 Act "establishes a program of cooperative federalism that allows the States . . . to enact and administer their own regulatory programs, structured to meet their own particular needs." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 767, *reh'g denied*, 458 U.S. 1131 (1982) (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981)).

2. The 1985 Act has minimal adverse impacts on the states.

In *National League of Cities* and its progeny, this Court was concerned with the potential impacts of a federal statute on a state's ability to "structure operations and set priorities" in the matter of governance. *See EEOC*, 460 U.S. at 240 (citing *National League of Cities*, 426 U.S. at 849-50.) In *National League of Cities*, the Court stated that federal control of the terms and conditions of state employment "displaces state policies regarding the manner in which [states] will structure delivery of those governmental services which

their citizens require." *National League of Cities*, 426 U.S. at 847. The most visible effect that the Court identified was financial — "forcing the States to pay their workers a minimum wage and an overtime rate would leave them with less money for other vital state programs." *EEOC*, 460 U.S. at 240 (citing *National League of Cities*, 426 U.S. at 846-47); *see also Hodel*, 452 U.S. at 292 n.33.

Petitioners argue that the 1985 Act is different than other statutes previously reviewed by the Court because it uniquely imposes burdens upon state governments. NYS Br. at 19-20; Cortland Br. at 23. Contrary to Petitioners' contention, however, the adverse impacts on the states from implementing the 1985 Act are minimal. Virtually all of the 1985 Act's penalties (surcharges and denial of access to disposal facilities) are imposed on LLRW generators, and not on the states. When a state fails to meet any of the milestones prior to 1993, the *generators* in that state are subject to surcharges and/or denial of access to the three existing regional disposal facilities. 42 U.S.C. § 2021e(d) (1988). Prior to 1993, no direct consequences are imposed on the states.

Beginning in 1993, if a state has failed to provide necessary disposal capacity, the only consequence that is likely to be incurred is that the state must rebate to generators a portion of the funds which the generators have paid as disposal surcharges. The state will be affected only to the extent that the rebated funds will not be available to the state for facility development. *See id.* § 2021e(d)(2)(C). (For a more detailed discussion, see pp. 5-8 supra.).

In addition, the 1985 Act allows cost-shifting onto generators for the development of regional or state disposal facilities. The New York legislature, in particular, has required generators within the state to pay for *all* costs associated with the development of the State's disposal facility. N.Y. Pub. Auth. Law §§ 1854-d.2.a.-b. Pursuant to this legislation, New

York has collected, to date, more than $41 million from the it's investor-owned and public utilities.[37]

Only when a state or compact region fails to provide for the disposal of LLRW generated within the state or compact region by January 1, 1996 (fifteen years after passage of the 1980 Act and ten years after passage of the 1985 Act), are direct consequences imposed on it through the take title provision. New York suggests that that provision goes beyond more traditional congressional responses to state inaction in areas of federal interest, such as the withholding of federal funds for a state's failure to regulate travel speed on public highways. In such cases, "States are left with the choice of whether state interests advanced by such funding outweigh the burden upon the state governmental structure in fulfilling the federal regulatory functions imposed upon it." NYS Br. at 26.

The choices offered the states under the 1985 Act are no different. If a state chooses not to use its governmental machinery to develop a LLRW disposal facility or cooperate with other states to do the same, then that state becomes liable for costs associated with the state's failure to act. As in the case of the withholding of federal funds, the net result is a financial burden on those states which have elected not to further a particular federal interest.

To be sure, the siting of a LLRW disposal facility, much like other industrial or commercial facilities, is a politically controversial task, and a state that undertakes such an effort will be subjected to strong pressure from groups who may oppose such a facility. However, it is self-contradictory to argue that the Tenth Amendment is a shield for state sovereignty and, in the same breath, that it insulates the states from the burdens that go with the exercise of that sovereignty.

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[37] This figure is obtained by totalling the amounts reflected in the New York Research and Development Authority invoices. *See* Brief for Defendant-Appellees, Nos. 91-6031, 91-6033 & 91-6035 at 19 (2d Cir. filed Apr. 15, 1990).

3. New York acquiesced in the 1985 Act.

Moreover, Petitioners at least implicitly concede that federal action which might otherwise violate the Tenth Amendment will be permissible where a state is in agreement with it.[38] According to Petitioners, however, the endorsement of the 1985 Act by state congressional delegations and organizations representative of the states was insufficient to demonstrate New York's willingness to participate in the federal scheme. NYS Br. at 27. Yet Petitioners never describe what exactly would be sufficient evidence of a state's agreement to a federal program.

Given the complex nature of both our federal and state systems, it is unrealistic to expect that whenever a federal statute affects state functions or responsibilities in a manner which might be constitutionally suspect without state acquiescence, that acquiescence can only be manifested by formal action of a state's legislature or its governor, or both. Rather, a state's acquiescence should also be ascertained in a practical manner on the basis of the actions taken by the state and its representatives, including those elected to Congress.

This realistic view of federal-state relations has been applied in a closely related area. Thus, when Congress granted its consent to the various regional LLRW disposal compacts, it did so subject to various conditions. Under the Commerce Clause of the U.S. Constitution, compact member-states accept or consent to those conditions by acting under them and proceeding to implement the compact. No formal state reratification is required.[39]

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[38] "[P]ermissible federal mandates to States as sovereigns were always linked to a State's willing participation in the particular activity involved." NYS Br. at 19; *see also* Cortland Br. at 7; Allegany Br. at 15.

[39] *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 281-82 (1959); *Concerned Citizens of Nebraska v. NRC*, No. CV90-L-70, slip op. at 6 (D. Neb. Oct. 19, 1990), *appeal docketed*, No. 91-2784 NEL (8th Cir. Apr. 22, 1991).

While New York has chosen not to join a compact, the situation is, nevertheless, analogous. If New York's support of the 1985 Act through the various state representative organizations, through its elected congressional representatives, and through its state officials is not enough to demonstrate the state's willingness to participate in the federal scheme, its subsequent efforts to implement the 1985 Act should be.[40] Soon after passage of the 1985 Act, New York enacted legislation providing for the siting and financing of a LLRW disposal facility. In addition, New York's LLRW legislation created a commission and an advisory committee to decide on disposal sites and methods, and assigned various new responsibilities to state agencies with regulatory authority over nuclear activities.[41] In 1988, New York initiated the siting process mandated by the 1986 legislation.

Thus, New York in fact consented to the 1985 Act and began to implement it. That New York has, in essence, now "changed its mind" does not cause the 1985 Act to be destructive of state sovereignty.

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[40] In July 1990, the New York state legislature appears to have expressed its disagreement with the take title provision by adopting the following legislation:

> [t]itle to any low-level radioactive waste shall at all times remain in the generator of such waste, including the period following acceptance of such waste by the authority at the permanent disposal facilities.

N.Y. Pub. Auth. Law § 1854-d.6. (McKinney Supp. 1992). This legislative attempt by the State to overcome its obligation to take title to waste generated in New York is not only contrary to the provisions of the 1985 Act, as the State freely admits (NYS Br. at 29 n.18), but also directly contravenes the State's pledge to the federal district court that New York "intends to go forward and continue to comply with the Act pending developments in this lawsuit." Complaint ¶ 31 (*see* Joint Appendix at 19a).

[41] N.Y. Envtl. Conserv. Law §§ 29-0301 to -0305, 29-0501 to -0503 (McKinney Supp. 1992).

4. The nature of the federal interest advanced in the 1985 Act justifies state submission.

This Court has consistently recognized that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Hodel*, 452 U.S. at 288 n.29 (citing *National League of Cities*, 426 U.S. at 852-53); *see also FERC*, 456 U.S. at 764 n.28.[42] As discussed on pp. 3-5 supra, Congress enacted the 1980 Act and the 1985 Act in order to avert national disposal crises that threatened critical medical, research, energy and other services. It is those very services which Congress intended to encourage when it stated that:

> It is . . . the policy of the United States that . . . the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, . . . [and that radioactive] material affect[s] interstate . . . commerce and must be regulated in the national interest.

42 U.S.C. §§ 2011, 2012(c) (1988). Because of the need to assure the continued availability of those services, there is an overriding national interest in assuring adequate LLRW disposal capacity. This overriding interest is sufficient to outweigh any adverse impact that the 1985 Act arguably may have on state sovereignty. Further, while the circumstances in which "state submission" is justified have not been defined with precision, the potential for such a national disposal crisis, the unusual federal-state cooperative program developed to prevent it, and the minimal impact on the states' essential governmental functions, strongly suggest that what is presented by this case represents a circumstance in which state submission is appropriate.

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[42] The dissenting opinion in *Garcia* reiterated this view, interpreting *National League of Cities* and its progeny as contemplating that an overriding federal interest might, in certain circumstances, outweigh the state interest in autonomy. *Garcia*, 469 U.S. at 562-64 (Powell, J., dissenting); *Id.* at 588 (O'Connor, J., dissenting). *But see Id.* at 579 (Rehnquist, J., dissenting).

III.
CONCLUSION

The 1985 Act should be held to be constitutional in its entirety and the decision below affirmed.

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March 4, 1992

Respectfully submitted,

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